HOGAN MARREN BABBO & ROSE, LTD

Memo

TO:	Attorneys
FROM:	John P. Marren
SUBJECT:	Consolidated Appropriations Act ("CAA") - Becoming an Activated Fiduciary
DATE:	7/18/2023
CC:	

Intro-basic background to CAA

The CAA amends ERISA laws dating to 1974, requiring health Plan Sponsors to take specific actions to fulfill their roles as "Activated Fiduciaries." It has two important characteristics: first it creates fiduciary responsibilities for health Plan Sponsors (defined below); second, compliance with its requirements is designed to be a major component of the goal to drive down health care spending by plans. In its purest form, compliance with the CAA will result in the availability for all plan participants to access the most competitive pricing for plan services, from Providers with high quality outcomes, regardless of plan demographics. While the 1974 ERISA provisions applied to retirement and health plan sponsors alike, the roadmap to achieve such a fiduciary plan process for health plans was very unclear. The new provisions provided by the CAA (and the imbedded transparency regulations for healthcare Providers) contain certain important mandates and deadlines that guide health care Plan Sponsors towards a good faith compliance effort, thereby achieving "Activated Fiduciary" status.

On February 23, 2023, the federal government released a "Frequently Asked Questions" (FAQ) document (attached) that described the actions employers must take to become an "Activated Fiduciary" and pointed them to a website where all employers must attest to their "Good Faith Compliance Effort." The first attestation will cover the period beginning December 27, 2020, through the date of the attestation (but no later than December 31, 2023). Subsequent attestations, covering the period since the last attestation, are due by December 31 of each following year.

Who is the Plan Sponsor?

The Plan Sponsor simply stated is "The organization that initially set up the health care plan. This is typically the employer. The individuals responsible for administering the plan. . . are typically employees of the organization — often the human resources manager or chief financial officer, or both" as described in this Capin Crouse article. (https://www.capincrouse.com/wp-content/uploads/2019/05/CapinCrouse-Third-Party-Administrators-vs.-Retirement-Plan-Sponsors.pdf - downloaded July 15, 2023)

Responsibilities for Plan Sponsors as Fiduciaries

As a fiduciary, Plan Sponsors are subject to specific codes of conduct, to act in the best interest of participants and their beneficiaries in a group health plan. Under CAA, fiduciary responsibilities dictate that Plan Sponsors carry out their duties prudently. The goal of the group health provisions passed in the CAA legislation is to improve transparency. This lack of transparency has historically made it near impossible for Plan Sponsors and their advisors to see their data and make informed decisions around improving their health plans and reducing the rising costs within them. The new legislation aims to address these deficiencies by outlining a Plan Sponsor's responsibilities as a fiduciary across four (4) key areas.

1. **Removal of Gag Clauses from Service Provider Contracts on Price and Quality Information**
   Gag clauses in contracts prohibit an employer from having full transparency and utilize their data as a fiduciary. As an example, a Plan Sponsor would be restricted from using their data for plan benchmarking or use it in a RFP process. Plan Sponsors must attest to removal by the end of the year. Advisors should work with their clients to inventory and remove these gag clauses from the underlying contracts.

   With the removal of these gag clauses service providers must provide complete participant information. Plan Sponsors and their advisors will have more access to their data to make informed, cost-effective healthcare decisions, and be able to show that employee costs related to claims are expended in a prudent manner. This will allow the Plan Sponsor and advisor to establish both a fiduciary procurement process and better identify waste through comparative analytics.

2. **Establish Reporting Requirements for Pharmacy and Prescription Drug Disclosures**
   Plan Sponsors must report certain information to HHS, DOL, and Treasury, including drug pricing, frequency of prescription, drug cost increases, premiums, rebates and out of pocket costs. This annual report requires evidence that the Plan Sponsor's actions serve the economic interest of the enrollee. It is important to note that the prescription drug reporting can be done by the plan sponsor, or by a carrier or TPA on an aggregate basis, on their behalf. However, if a party other than the plan sponsor does the reporting, it is incumbent on the plan to receive their own individualized data so that they van complete the required "benchmarking" function.

3. **Disclosure of Direct and Indirect Compensation from All Service Providers**
   CAA requires the reporting of direct and indirect compensation over $1000 from all service providers. These rules require the disclosure of the service providers role in providing fiduciary services and the direct and indirect compensation received by service providers related to the health plan.

4. **Required Parity in Substance Abuse and Mental Health Benefits**
   CAA requires Plan Sponsors to analyze non-quantitative treatment limitations on MH/SA benefits to show parity with medical and surgical care. Non-quantitative treatment limitations refer to network admission criteria, medical management programs, and coverage policies (i.e., access to substance abuse facilities). Quantitative treatment limitations include copay requirements or a restriction on the number of treatments.

Vital Take-Aways for Plan Sponsors and Advisors

The changes passed into law through the CAA apply to all Plan Sponsors of health care programs. Plan Sponsors and their advisors will need to meet their obligations under the legislation and any future regulations, while seizing opportunities for growth, improving benefits, and decreasing waste:

- As a fiduciary, Plan Sponsors must attest to the fact that they have implemented a process to understand and report on the details of their benefits program and prove that they are working in the best interest of plan enrollees. To do so, they must develop a rigorous procurement process, and quickly.
- Plan Sponsors must ensure they have access to all data available to understand what they are paying for and to demonstrate that it is in the best interest of their plan participants. The ability for Plan Sponsors and advisors to use data will be essential if they are to meet their fiduciary responsibilities which will lower costs and improve participant outcomes.
- The Plan Sponsor's advisor will play a pivotal role in helping the Plan Sponsor establish a fiduciary procurement process and develop solutions to help bring down healthcare expenses.

The bottom line for Plan Sponsors is that while the CAA legislation lays out the key responsibilities as a fiduciary, it is possible for Plan Sponsors to use these requirements to reduce costs and improve participant outcomes. For the advisor, the legislation provides a significant opportunity to embrace these new rules and differentiate their business.

Enforcement.

For health plans subject to ERISA, the U.S. Department of Labor and plan participants and beneficiaries may enforce compliance with these rules. Plans not subject to ERISA may be subject to enforcement by the U.S. Department of Health and Human Services. HHS shares responsibility for enforcement against insurers with state agencies. In addition, the Internal Revenue Service may impose an excise tax of $100 per day per affected individual under section 4980D of the Code for any failure to comply. Compliance also allows Plan Sponsors an affirmative defense against a Plan Sponsor claiming the Plan Sponsor has not acted under their new fiduciary obligations.

Relationship of this memo and the one on PBMs

This is part of a two-memo set. This memo references the Plan Sponsor to apply the CAA to PBMs. The attached memo describes the **misdoings of Pharmacy Benefit Managers ("PBMs").** These relate to each other because Plan Sponsors with ERISA-covered health plans must obtain certain information from brokers and certain consultants before entering into or renewing a PBM contract. These disclosures give Plan Sponsors revealing insight into the reasonableness of the compensation that PBMs, brokers and consultants receive and the vendors that contribute to that compensation.

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